No. 2830

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE AMERICAN SCHOONER "HALCYON," her tackle, apparel, machinery, boats, furniture, appurtenances, cargo and freight money, and J. A. T. OLSON, master and claimant,

Appellants,

vs.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Hawaiian corporation, owner of the Steamer "Niihau," for itself, the officers and crew of said steamer and other servants of said owner,

Appellee.

APPELLANT'S BRIEF.

NATHAN H. FRANK,
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Proctors for Appellant.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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APPELLANT'S BRIEF.

This is an action for salvage services rendered on the 13th of January, 1914, in the harbor of Hilo, Island of Hawaii.

The points that we propose on this appeal are two, viz.:

1. The "Niihau" was guilty of such negligence or misconduct in the performance of the service as to disentitle her to salvage.

2. If she be entitled to salvage, the award of one-half of the value of the vessel and one-third the value of the cargo is, under the circumstances, grossly exorbitant.

I.

THE "NIIHAU" WAS GUILTY OF SUCH NEGLIGENCE OR MISCONDUCT IN THE PERFORMANCE OF THE SERVICE, AS TO DISENTITLE HER TO SALVAGE.

In the main, the facts are pretty well settled. It appears that on the evening of January 12, 1914, the schooner "Halcyon", laden with a cargo of lumber (a small portion of her deck load having been discharged), and lying alongside the wharf in said harbor, starboard to the wharf, was made fast thereto with two lines, and also breasted off the wharf by means of two lines running to two buoys about 200 feet from the wharf, and with her port anchor down.

At about 9 o'clock of that evening she carried away her head-line and fell to the stern, colliding with a little schooner at the wharf astern of her.

She was hauled off from this position by means of her breast-line running to the buoy, after which the starboard anchor was dropped. The vessel was then about a couple of hundred feet from the wharf. One of the lines to the buoy carried away, and about 3 o'clock in the morning the master ran another line out to the buoy. She was then held by the two lines to the buoy, and the two anchors.

The position in which she was at that time is somewhat in dispute, as the master of the "Halcyon" testifies that he was then "just about abreast of the little schooner". (Rec. p. 120.) Other witnesses put him further in, at a point marked on Libelee's Exhibit No. 1 as "Halcyon-2". None of the witnesses have much foundation for fixing her position in the proximity of the piles, because it was a dark night, and no one seems to have seen the piles.

Perhaps the most reliable testimony upon this subject outside of that of the master of the "Halcyon" is that of Morton, the purser of the "Niihau", because he was passing the "Halcyon" and also the "Ka Moi" on his way to the "Niihau", and therefore observed both vessels. He attempted at first to fix the distance of the "Halcyon" from the piles, which was evidently the result of theory, and not observation. He finally says that his distances are approximate, and that it was a dark night, and he did not pay any attention to the distance. (Rec. p. 303.)

However, after making his drawings and testifying to the position with respect to the piles, he concludes:

> "My drawing this map here kind of balls things up a little. The 'Ka Moi' was lying here and she wasn't far from the schooner.
>
> Q. How far away was the 'Ka Moi' from the schooner at that time?
>
> A. I can't tell you that because it is hard telling it going out on a dark night when you can see just a few feet ahead of you; approximately about two hundred or two hundred and fifty feet from the 'Ka Moi'." (Rec. pp. 302-03.)

Allowing for the distance which the "Halcyon" had been swung out from the wharf in order to clear the "Ka Moi", this testimony as to the distance of the former from the latter is not much different from that of the master of the "Halcyon", when he says he was just about abreast of the little schooner.

Whatever her position was at that time, it could not have been one of very great danger. Of course, it was not a desirable position to be in, and the captain gave expression to his recognition of that fact by his calling to the passing boat, and his exhibition of blue lights. Nevertheless, it must be borne in mind that he was then being held by two anchors and two lines to the buoy ahead, and that the point where he lay was more or less protected by the wharf. It is admitted by the master of the "Niihau" that at the point where the "Halcyon" then lay, neither the wind nor the sea was as strong as it was at the outer end of the wharf (Bruhn, p. 415.) It must also be borne in mind that the schooner "Ka Moi" was lying at the wharf, a distance of not more than 250 feet from her, and, so far as appears, safely moored to the wharf during this entire period.

The "Halcyon" lay in that position for about an hour, during which time the master's conclusion that she did not drag, because if she had she would have parted his line to the buoy, or dragged the buoy (neither of which seems to have occurred), appears to be reasonable.

So, also, it is to be noted that the row boat of the "Niihau" does not appear to have experienced any

difficulty in going out of the river, past the "Halcyon" and past the wharf, to the "Niihau", lying beyond the outer end of the wharf.

It appears that the purser, in this small boat, reported to the master of the "Niihau" that the schooner wanted assistance, whereupon the latter vessel hove up her anchors, steamed over toward the outer end of the wharf, where she dropped both her anchors, paid out 90 fathoms of chain, and by this means backed down toward the schooner. (Rec. p. 335.) He then sent a small row boat with a six-inch line to the schooner, which was made fast to the latter.

After the line had been passed from the "Niihau" to the "Halcyon", the master of the former sent his mate with the boat's crew to make soundings (Rec. p. 339), and so far as they could judge, the depth of the water was 3 fathoms at the bow, and about 2½ abreast the mizzenmast, which is close to the stern.

These soundings, if accurate, place the vessel somewhat further out, as the nearest to 3 fathoms in that vicinity is 17 feet somewhat to seaward from the inner end of the wharf.

Whatever conclusion we come to from this data as to her position, certain we are that in this position there was not very much danger to the schooner, nor very much danger to the salving vessel in rendering the service.

The salving vessel was coming in alongside of a wharf with which the master was familiar. She was held by her anchors in position, and while we do not

intend to urge that the service was not at this time a salvage service, because we appreciate the fact that any danger to the salved vessel is sufficient to change the nature of the service from that of towage to salvage, yet, with all the circumstances considered, it was necessarily a very low order of salvage service.

The most that the libelants claim with respect to danger to themselves in rendering this service is, that the "Niihau" might in some way have become foul of the buoy, and if she had, (of which there appears to have been very little likelihood, the master's claim being that fouling might have resulted from his swinging to his anchors when he first dropped them), what could have been the result? The most likely thing is that he would have ridden over the buoys, which are nothing but flat wooden boxes. We would not expect his propeller to become engaged, because in that operation he would not use his propeller, but would be swinging to his chains. However, assuming that the propeller might have become engaged, nothing could have happened to him, for he was riding at two anchors, and daylight was not far off.

We are prepared, however, to give him the benefit of any danger which he sees fit to claim in this connection. It is yet not of such a serious nature as would entitle him to any unusual award.

The other danger which he claims was a danger to his small boat in passing the line. However, in this connection, it will be observed that his small boat carried the six-inch hawser and passed the line to the "Halcyon" without using a surf-line, and did it

successfully. It will also be observed that the "Niihau's" small boat came out of the Waiakea River, thus having traversed what must be considered to have been the most dangerous part of the trip between that river and the new position of the "Niihau", and also proceeded further out into the harbor alongside the "Niihau" in her original position. All this was done in the ordinary course of the business of the vessel without any connection with salvage operations. So we think it may fairly be concluded that this assumed danger to his small boat in passing the line is at best an exaggeration, if nothing more.

So we contend that had nothing further occurred than the passing in of the steamer "Niihau" and the picking up of the "Halcyon" from its first position, and towing him to a safe anchorage out in the harbor, the award must necessarily have been a nominal salvage award.

Parting of the Tow Line and Delay In Rendering Assistance.—At this point the circumstances arose upon which the principal controversy in this case centers:

When the "Niihau" had drawn the "Halcyon" away from the position which we have just been considering, and had towed her a considerable distance into the Bay outside of the buoys, toward the end of the wharf (which position the master of the "Niihau", in his drawing, Libelee's Exhibit B, indicates as "Halcyon-2"), the tow line parted. When the towing started, the "Halcyon" lost her port anchor, and while being towed to this position was compelled to slip the hawser which she had attached to the buoy. As soon as the

tow line parted, the "Halcyon" dropped her starboard anchor. The "Niihau" was then some 300 feet ahead of her. The storm, according to the libelant, was at this time as bad, if not worse, than it had been at the time the "Halcyon" originally parted her lines from the wharf and dragged her two anchors, while the new position was more exposed.

The master of the "Niihau" testifies that it was blowing at the rate of 40 miles an hour, with the sea in five or six foot billows running toward the shore.

The fact of the first break from her moorings, and dragging of the "Halcyon" would have been sufficient to warn any seaman of ordinary experience that this new position, after the parting of the tow line, could not be a safe anchorage with one anchor down, and even without these antecedent warnings no one of ordinary knowledge of such affairs would think of relying upon an anchor taking immediate hold when dropped in such a seaway and under such conditions.

In fact the master of the "Niihau" knew that it was not a safe anchorage, for he says that he had intended to take her out "to a safe anchorage out in the Bay there" (Rec. p. 392), which position the witness indicates by a cross surrounded by a circle on the map Libelee's Exhibit No. 2. He further testifies that he noticed at that time that she had but one anchor, and that fact, as well as the condition of the wind and water, were considerations that suggested to him the feasibility of standing by her:

> "Yes, that as well as the wind and water; of course I didn't know how much chain he had or the

> condition his anchor was in; if it was a heavy anchor or a light anchor; that I didn't know." (p. 393.)

Nevertheless, upon the parting of the hawser, the "Niihau" took no immediate steps to ascertain the conditions or to save the "Halcyon" from further damage or injury.

There seems to be no question of the feasibility at this time of the "Niihau" again sending a boat back to the "Halcyon", or, indeed, of the "Niihau" herself coming alongside to ascertain whether the "Halcyon" was reasonably safe under these conditions. Small launches and row boats seem to have been in the neighborhood cruising about, which indicates sufficiently the practicability of sending the small boat, which originally passed the line to the "Halcyon", back to her a second time, either with a line to again make fast, or at least to satisfy the master of the "Niihau" of the conditions with respect to the safety of the "Halcyon". But he did neither of these. On the contrary, *he dropped his anchor*, and he does not appear to have been aware that the "Halcyon" was dragging until some 15 or 20 minutes thereafter.

The tow line parted at about 6 o'clock in the morning. (Bruhn, pp. 393-409.) He watched her drag for about two hours, and until, as the libelant himself claims, she was well within the breakers, and had sent out signals of distress, before he sent a boat out with a line to render her assistance. He had, however, at some point of time within this two hours, changed his position closer to the vessel on the beach.

The master of the "Niihau" makes claim that the small boat was on the way between the two vessels, with a line, when the signal of distress went up. Even as to this he is disputed by observers from the shore, who were disinterested except in so far as they represent consignees of the cargo at the port of discharge. The materiality of this fact, in which a difference of about 10 minutes is involved, lies in the suggestion that he was waiting for the distress signal as an acknowledgement of extreme danger.

But whether he waited for the signal of distress or not, he certainly waited until she was in a position which he now claims was one of great danger—danger of total loss of both vessel and cargo—before he sent a line to her assistance.

Under these conditions, the fact is undisputed that from the time she parted her hawser, which the master of the "Niihau" fixes at "somewhere around 6 and a little after 6" (pp. 393, 409), until she had gone into the breakers ashore and had grounded, no second hawser was passed to her.

Prima facie these facts suggest negligence, or something worse. It is not an unusual experience in these cases to find salvors allowing vessels while yet in comparative safety, to get themselves into a position of extreme danger before proceeding to their assistance, upon the theory that by thus rescuing them from the greater apparent danger they will enhance the value of their services—that the danger being thus demonstrated, no question can be made with regard thereto—and upon a fair consideration of the evidence in this case we

are impressed with the idea that this is but another illustration of such tactics.

The familiarity of this Court with such practices is demonstrated by what is contained in the case of *Pacific Mail Steamship Company v. Commercial Pacific Cable Co.*, 173 Fed. R., 46, and we ask the indulgence of the Court for quoting part of the language appearing there:

> * * * "while he who holds back and quietly looks on at approaching ruin until his own services become indispensable to the preservation of the property he sees exposed, with the expectation that his reward will thereby be increased in proportion to the increased danger from which the property is ultimately rescued, will find that he is disappointed in the realization of his golden hopes, and that a display of avarice at such a time renders him an object of contumely and reproach."

As we have already said, the lapse of time, and the conditions attending this service, make out a prima facie case against the master of the "Niihau", and of this he seems to have been aware, for he is immediately placed upon the defensive.

Now let us see how he meets it, and what his explanation is.

We have already pointed out that when his line parted he did not take immediate steps to insure the safety of his tow. He dropped his own anchors, which, under the circumstances, he should not have done. After having dropped his anchors he says that he observed her for 15 or 20 minutes before he noticed that she was dragging and drifting toward the beach (pp. 395-

96); and that in the meantime, from the time that he saw her dragging until she got on the beach, until "she got as close to the beach as she ever got, that is an hour and three-quarters, *we were preparing, getting everything ready*". (pp. 396-97.)

The Court will notice how the witness (pp. 394-95-96-97) continually repeats the indefinite excuse for his delay, "We were preparing".

When finally forced to particularize, he is compelled to admit that this "preparing", this "getting everything ready", *would have occupied not to exceed half an hour.* Note the following:

> "Q. You say you were preparing. What did you do in the line of preparing?
>
> A. Getting everything ready.
>
> Q. What was that?
>
> A. That was in the case of lines, coiled in our boat.
>
> Q. And how long a time did that take?
>
> A. Well, that doesn't take so very long; took the time I got everything ready to stand by and move the ship slow.
>
> Q. How long a time in point of minutes did it take for you to heave your anchors, prepare your lines, and get your boat in readiness?
>
> A. In readiness? About something like about a half an hour; every bit of that." (pp. 396-97.)

Again:

> "Q. Now how long a time elapsed from the time you left the position N-1 until you got to the position N-2?*

*N-1 is the position the "Niihau" anchored when the line parted; N-2 is the position of the "Niihau" at the time she passed lines to the "Halcyon."

A. How long a time up to the present time here now?

Q. How long a time did it take from the time that you left your position at N-1 until you arrived at your position at N-2?

A. To steam down there and redrop the anchors, that didn't take long. I never marked the minutes down, the exact minutes. In that space of time we was preparing and moving right along; when we arrived in this position here we was continually working around and watching the 'Halcyon' trying to follow her up. I didn't mark down every little thing.

Q. From the time you left N-1 until you arrived at N-2, until you dropped anchor at N-2, how long?

A. That was somewhere around 25 minutes.

Q. Did you send her a line, did you send the 'Halcyon' a line immediately upon your arriving at the position N-2?

A. We started right after the 'Halcyon', yes; got the boat crew and everything else. (pp. 398-99.)

* * * * * *

Mr. Russell. How long a time elapsed from the time that the boat's crew were in the boat until the boat started with the line?

A. Well, that was a few minutes; it might have been between 5 and 10 minutes, to get the surf-line.

Q. Captain, you say that about 15 or 20 minutes after the tow line parted you saw the 'Halcyon' begin dragging her anchor. Let us assume that it was 20 minutes. You say that you took from 20 minutes to 25 minutes more to proceed from N-1 to N-2. Is that right?

A. That's the time we got there; it didn't take us that time to get that far; that maneuvering and everything included, going ahead." (Rec. p. 399.)

We will not reprint the rest of the testimony upon this subject. We consider the foregoing a fair statement of its general effect, but we suggest that the subsequent

examination of this witness, pages 400 to 411, be read in this connection. It does not change the facts, but it does illustrate the fact that the master's attempt at explanation does not explain. The inevitable conclusion from the whole testimony is, that he was not doing his duty, and that he was aware of that fact.

If anything were needed beyond the nature of this testimony to cast doubt upon the good faith of the master in this regard, we have but to recall the language of the Court in the case of *The Roberts,* that the testimony of witnesses in this master's position, "when it relates to what can be construed into their own misconduct, should be viewed with great suspicion". (20 Fed. Cas. 923.)

Having in view this inability of the master to explain his delay in rendering this service, we have but to consult the testimony of two shore witnesses of that particular part of the transaction. They are Mr. E. T. Nicholls, the manager of the Hilo Mercantile Company, and Mr. J. D. Easton, assistant manager of said company. The Hilo Mercantile Company was the consignee of a part of the cargo of the "Halcyon", the rest of it being consigned to the Hackfelds. (Rec. p. 437.)

These gentlemen are able to testify accurately respecting the time, because of memoranda made by them at the time of its occurrence.

Mr. Easton was on his way from his house to his work, and at about 10 minutes to 7 saw the "Halcyon" from his position on the road by the bridge across the Waiakea River, marked on libelee's exhibit by a cross,

and watched the vessel practically all the time after that until the "Niihau" sent her a line. He came up to the store and rang up Mr. Nicholls, and went down to the beach and watched her off and on all morning, until they got her out. (Rec. p. 437.) He says that the "Niihau" sent her a line between 8 and 9 o'clock; he does not know the exact time; that he took particular notice of the "Niihau"; *that he noticed her about a quarter to 8, at which time the "Niihau" changed her position.*

> "She was lying considerable distance off shore; about a quarter to eight she came in closer; then they had a shore boat alongside her; one of their shore boats and some men in it. I noticed that particularly. The 'Niihau' changed her position only once."

Before she changed her position, he saw her almost due north of the railroad wharf.*

> "At that time she changed her position to the point where she began to tow the 'Halcyon', came in and dropped her anchor and then backed up. And *after she dropped her anchor in her changed position* it was about *an hour or an hour and a quarter* until the boat was sent to the 'Halcyon'." (Rec. p. 438.)

That the small boat went out from the "Niihau" just as the signals of distress were put up by the "Halcyon". That the tow out to the anchorage in the Bay was completed at 10:05, which time is fixed from a memorandum made by him on the manifest of the ship. (Rec. p. 440.)

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* By consulting the map it will be seen that this is the position where she dropped her anchor when the tow line first parted.

The witness is positive that the small boat did not leave the steamer *until after the flags* of distress were put up (Rec. p. 441), but that it left immediately after the signal. (Rec. p. 442.) The "Niihau" was on her inside anchorage *at least an hour before she put the boat out.* (Rec. p. 442.)

Mr. Nicholls was on the railroad wharf when the "Halcyon" broke out her signals, and *from a memorandum made at the time he fixes this at 8:35 in the morning* (Rec. p. 454-55), and says that the life boat departed for the "Halcyon" after the signals went up, about 5 or 10 minutes after. (Rec. pp. 455-56.) That he observed the steamer for an hour and a half before this; that he was on the wharf at 7 o'clock, or about 7. (Rec. p. 456.) When he first saw her she was out toward the end of the railroad wharf, and changed her position and came back in towards where the "Halcyon" was lying, where she remained *half or three-quarters of an hour before she sent a boat to the "Halcyon".* (Rec. p. 456.)

He is also positive that the small boat did not leave before the distress signal went up, but left a few minutes afterwards (Rec. p. 458), within a matter of 5 or 10 minutes after the signal broke out, the small boat left the steamer's side.

From the foregoing testimony we at least have definitely fixed the point of time when the signals were displayed; that was 8:35 in the morning, and we have the small boat going out 5 or 10 minutes after.

We have also definitely fixed the fact that the "Niihau" did not leave her first anchorage until *after*

7 o'clock, for both these men saw her leave her first anchorage, and Mr. Nicholls not having arrived at the point of observation until about 7 o'clock, it is definitely certain that the "Niihau" did not start in immediate pursuit of the "Halcyon". That she delayed at least an hour, if not more, in starting.

We have also definitely fixed the time between the breaking of the hawser and the sending out of the small boat, for the master of the "Niihau" insists that it was not more than a quarter past 6 when the hawser parted. As we find it was 8:40 or 8:45 when the small boat was sent out, we have a matter of over 2 hours and 20 minutes to be accounted for.

We have also the master's testimony to the effect that the time he consumed in "preparing" (which preparation according to his testimony included everything necessary between the start from anchorage No. 1 to the putting out of the small boat from anchorage No. 2) was not to exceed 25 minutes. So, we have two hours of inactivity, under circumstances such as called for the greatest activity.

As we have already suggested, this to our mind is conclusive evidence of gross negligence, or something worse. For the purposes of this case we do not conceive it to be necessary to determine what the motive was. The "Niihau" had taken the "Halcyon" from a position of comparative safety, and had allowed her to drift into a position of what is claimed to be one of extreme danger, and where, from the testimony of the surveyors, she must have sustained considerable damage. Under such circumstances it is questionable if

she be entitled to any award at all. We shall presently refer to some cases touching this question.

In the meantime let us for a moment consider the parting of the tow line.

We Regard This, Also, as Prima Facie Evidence of Negligence on the Part of the "Niihau".

The cases of *The Sweepstakes,* Fed. Cas. No. 13,687, and that of *The Quickstep,* 9 Wall. 665, while not exactly parallel cases, are sufficiently so to suggest the rule which we seek to apply in the present case.

In the first of the above named cases, the Court said:

> "Undoubtedly it was the duty of the tug to see that the line was securely fastened, no matter what mode of fastening was adopted, and so as to hold in all emergencies likely to happen, whether ordinary or extraordinary; and the fact that it did not so hold is the best evidence that the duty was not performed. I know of no safe rule other than to hold tugs responsible prima facie in all cases, for injuries resulting from the tow line slipping or giving away from its fastening upon the tug. The expert testimony shows, and without it common sense teaches, that a tow line can be fastened so that it will not slip, and therefore the above rule is not unreasonable. *The Quickstep,* 9 Wall. 665; *The Olive Baker,* Fed. Cas. No. 10,497."

In the second of said cases, which was a towage of canal boats in which a collision occurred by reason of the *parting* of the tow line, the Court said:

> "It was the duty of the tug, as the captains of the canal boats had no voice in making up the tow, to see that it was properly constructed, and that the lines were sufficient and securely fastened. This was an equal duty, whether she furnished the lines

> to the boats, or the boats to her. In the nature of the employment, her officers could tell better than the men on the boats what sort of a line was required to secure the boats together and to keep them in their positions. If she failed in this duty she was guilty of a maritime fault."

The case of *The Margaret,* 96 U. S. 494, also seems to support our view of the claim of negligence on the part of the "Niihau".

In that case the vessel was under tow, and one of the hawsers parted, by reason of which the vessel was thrown by the force of the swell on the end of the pier, and sunk. In the crisis thus brought about, the tug did all that could be done to relieve her from the perils of her situation, but without avail. The Court said:

> "If the tow line was too weak, the tug should have called attention to it. Silence was a fault."

After stating that the tug was bound to exercise reasonable skill and care in everything relating to the work, and that "the want of either in such cases is a *gross fault,*" the Court continued:

> "The spring head of the disaster was the sudden turning of the tug around the end of the pier, combined with the shortness of the tow lines. This involved the stopping of the tug and the loss of steerage-way of the brig.
>
> "Conceding that the mode of entering the harbor by the tug was the best under the circumstances, and the disaster therefore inevitable, then the effort showed a clear *want of judgment.* As before remarked, she should have known this and governed herself accordingly. *Her conduct, in this view was more than an error, it was a fault;* and upon this ground she should be condemned."

The application of this rule to the present case is found in the fact that if the line was parted by reason of the storm, then having in view the fact that the "Halcyon" had originally broken from her moorings, having parted two lines and dragged two anchors, ordinary diligence in undertaking the tow would require that two lines, instead of one, be used in towing her out, as was actually done by the "Niihau" in the case of the second tow. The "Niihau" having undertaken to tow the "Halcyon" out to a safe anchorage, and for that purpose having herself furnished the line, it was his duty to see that he furnished a line sufficient for the purpose.

If it was not the storm that parted the line, but on the contrary if it was, as contended by the libelant, that the line was cut by contact with one of the buoys, such parting was likewise the result of negligence on the part of the "Niihau", because the master of the "Niihau" testifies that when he first made fast to the "Halcyon", he took up a position such as required him to pass his line *between* the buoys, and which would necessitate the line being drawn across the buoys during the towage. If he knew this at the time he testified, he must have known it at the time of making the tow; and if he didn't know it at that time, it is because he did not take the proper precautions in the premises. He had taken the precaution of sending out a small boat to make soundings alongside of the "Halcyon", and since in his testimony he makes so much out of the alleged danger to his tug by reason of the proximity of the buoys, it would have been but ordinary prudence upon his part

to have also sent his small boat out in order to fix the location of the buoys with respect to the tow he was about to undertake.

If, as suggested in the above cases, it was his duty to see that he furnished a line sufficient for the purpose, it was further his duty to see that the line, when made fast, was so made fast as not to be interfered with by the buoys in the process of towing.

For the foregoing reasons we deem that the parting of the hawser itself was prima facie negligence upon his part, for which he offers no excuse.

Action After Tow Line Parted.—If we confine our attention to the actions of the master after the tow line parted, we have still before us a case in many respects similar to the case of *The Printer,* 164 Fed. R. 316-17, where a tug was held liable in damages for leaving the schooner with undue haste, and in not standing by to see if she was safely anchored, in the course of which opinion the Court said:

> "The master of the tug undertook a certain towage service. He was prevented from the continuous performance of that service, by the condition of the tide. But the duty of the tug to the schooner was a continuous one from the time when she was taken in tow until the completion of the towage contract. The tug's duty did not end with letting go the tow line at the anchorage grounds. Its obligation of reasonable care continued, at least until the schooner was safely anchored. Connolly v. Ross (D. C.), 11 Fed. 342; The Snap (D. C.), 24 Fed. 510; Hastorf v. The Governor (D. C.), 77 Fed. 1000; Hughes v. Railroad Co. (D. C)., 93 Fed. 510; The Thomas Purcell, Jr., 92 Fed. 406,

34 C. C. A. 419; The American Eagle (D. C.), 54 Fed. 1010; The Battler (D. C.), 55 Fed. 1006; Alaska Commercial Co. v. Williams, 128 Fed. 362; 63 C. C. A. 92; Brown et al. v. Cornell Steamboat Co. (D. C.), 110 Fed. 780."

THE RULE AS AFFECTING SALVAGE WHERE THE SALVAGE VESSEL HAS BEEN GUILTY OF NEGLIGENCE IN THE PERFORMANCE OF THE SERVICE.

We are aware that the Court is familiar with the cases under which this rule has been applied, as it had it under consideration in the case of *The Celtic Chief*, 230 Fed. 767. However, in order to point our view of the application made by the Courts of said rule to facts which we regard sufficiently analogous to the facts in the case at bar to warrant its enforcement in the present case, we take the liberty of presenting some of them in detail.

The Duke of Manchester, 2 W. Rob. Adm. 470. This was a case where a tug after pulling a vessel off of the beach subsequently ran her into difficulty by towing her aground on another shoal. The tug gave as an excuse, that the tow would not answer her helm, and further, that she was in charge of a pilot, by reason of which it was claimed the only duty of the steamer was to follow out the course which the pilot directed, and was not bound to interfere to prevent the consequences of steering in a wrong direction.

The facts were referred to the Trinity Masters, who found that the second grounding upon the Sandwich

Flats was not occasioned by the state of the weather or the disabled condition of the ship; that the stranding of the vessel could have been prevented by ordinary care and skill, and that there was on the part of the tug great culpability and negligence and disregard of duty.

The Court (Dr. Lushington) concurred in this, and said: that in addition to a neglect of her own duty, the tug was guilty of a great breach of all moral obligation in persisting in the course which she took, without giving warning to the persons on board "The Duke of Manchester". In his judgment that culpability was not in the slightest degree diminished by any error which might have been committed by the pilot on the board "The Duke of Manchester", for which reasons he refused to make any award in favor of the tug, and dismissed the action.

In the course of his opinion the Court used the following language:

> (p. 447.) "In the first place it is, I apprehend, an undoubted proposition, that salvors may be curtailed or even deprived altogether of their salvage remuneration through error, misconduct, or want of skill and capacity in the performance of a salvage service. Even where essential services have been rendered to a vessel, the subsequent misconduct of the salvor may not only diminish the amount of his reward, but his entire claim may be forfeited. This doctrine was distinctly laid down by Lord Stowell in the case of The Medina, which was cited by the Queen's Advocate; and in the case of The Neptune, which came before me, and in which I was assisted by two gentlemen of the Trinity Board, I myself acted upon this doctrine, and declined to give any salvage at all, the

> Trinity Masters having pronounced that the asserted salvors had been guilty of gross negligence, if not of wilful carelessness, *in allowing the anchor to let go, and in keeping the course of the ship to the north when they should have gone to the south.*"

The Cape Packet, 3 W. Rob. 122. This was a case where the salvors after rescuing the vessel in making the harbor caused the vessel to strike a rock.

The Trinity Masters found that the salvors were not justified in risking a disabled vessel by conducting it into the harbor over the course they took, and the Court made a deduction from what he would otherwise have awarded them, upon the principle laid down by the Court in that case as follows:

> "That when persons undertake to perform a salvage service, they are bound to exercise ordinary skill and ordinary prudence in the execution of the duty which they take upon themselves to perform. I do not mean to say that they must be finished navigators; but they must possess and exercise such a degree of prudence and skill as persons in their condition ordinarily do possess, and may fairly be expected to display. I need scarcely point out to you, that, where the neglect is wilful, it entails an entire forfeiture of the whole claim to salvage remuneration. This is not attributed to the salvors upon the present occasion. There may again be instances of such gross negligence, independent of any wilful attention, as would debar all claim for salvage recompense. Such was the case of The Lockwoods, which was cited in the argument by one of the counsel for the owners. There is also another kind of negligence, the effect of which is to diminish the amount of salvage award, not to take it entirely away. The extent of this diminution, I may further state, is not measured by the amount of loss or injury sustained, but is framed upon the

> principle of proportioning the diminution to the degree of negligence, not to the consequences." (Dr. Lushington, p. 125.)

The Mulhouse, Fed. C. 9,910. This was a case where salvors being in possession of the vessel, men from the shore came on board and stole a keg containing $5000. The thieves, while on their way to the landing, being discovered by fishermen ashore, whose boat they were using, dropped the keg overboard. It was subsequently recovered by the fishermen and returned to the captain of the ship.

The Court said that it was very plain upon these facts that the master, mate and seamen composing the whole crew who came up in the sloop from the wreck, and upon whom the *duty of watching and taking care of the goods* committed to their keeping was devolved, have forfeited their shares of the salvage, both upon the money and upon the cotton, because of their neglect to take proper care of the money; that it was their duty to exercise the same degree of diligence in keeping the property placed in their custody, that a prudent man ordinarily takes and exercises in keeping his own property, and tested by that rule they were guilty, not of ordinary neglect merely, but of gross negligence—so gross that it produces a suspicion that they were in collusion with the thieves.

> "But it is not necessary to accuse them of larceny or embezzlement. Their shares are as much liable to forfeiture for so gross a neglect of duty, as for embezzlement or larceny. 'The maritime law', says Justice Story, 'demands most emphatically from salvors, scrupulous good faith and uprightness of

> conduct—giving them a liberal reward for fidelity and vigilance, and visiting them with severe reprobation and diminished compensation for every negligence'."

The Court then cites many cases applicable to the above principle, among them being that of *The Cape Packet, The Duke of Manchester,* and also instances the case of *The Glory,* 14 Jur. 676, wherein

> "Dr. Lushington diminished the salvage two-thirds on account of the misconduct of the salvors, *in preventing the employment of a steam tug, though no loss or damage accrued to the owner of the property saved on account of such misconduct".*

The Roberts, Fed. Cas. 11,914. This is a very instructive case upon the question here involved. It is a long opinion, taking under consideration the rights of many salvors as affected by their connection with acts which are held to have been evidence of lack of skill, for which salvage was forfeited.

The vessel was upon a reef, and the first act for which the Court decreed a forfeiture of salvage was the fact that

> "The masters of the first three vessels all saw the ship strike before dark, and immediately started to her assistance. They knew that they could render no aid by themselves without their vessels, yet so eager were they, not to render assistance, but to get on board before some one else, that they all left their vessels at anchor from a half to three-quarters of a mile from her, and with small dingy boats pulled over the reef to get on board. This, even, when they left their vessels on the windward and exposed side of the reef, and when, according to the testimony of numerous experts, it would not

have taken more than half an hour more to have brought their schooners out to the ship."

Under these circumstances, the vessels

"did not arrive at the ship until between 7 and 8 o'clock thereby losing much valuable time, and time that would have enabled them to have had a heavy anchor and chain carried out by the next high tide". (pp. 922-23.)

After arriving at the ship, the wreckers proceeded to take out two small anchors, while the master of the vessel insisted they take out his bower anchor and chain, that they might have something to depend upon.

In determining the question of fact respecting this latter matter, the Court makes an observation which we think applicable to the testimony of the master of the "Niihau" in the case at bar, namely:

"The question of interested witnesses is also to be well weighed, and although, in admiralty, interested parties, *ex necessitate rei,* are permitted to testify, their testimony, *where it relates to what can be construed into their own misconduct,* should be viewed with great suspicion; and where confirming evidence can be introduced, and is not, the absence of such supporting testimony will weigh materially against receiving that of the interested party." (p. 923.)

As to the method adopted to heave her out, the Court, after considering the details, which, among other things, had to do with the parting of the hawsers, concludes:

"Were it not for the sad and disastrous consequences, it would seem almost absurdly ridiculous to see a company of seafaring men—licensed wreckers, who held themselves out as qualified and competent—attempting to heave a ship, hard

> aground, with 1800 tons of stone and iron in her, afloat with a six-inch line, after they had parted a twelve-inch hawser in the same service."

We make this quotation for what it is worth in connection with the fact that in the present case a six-inch tow line, which parted during the service, was used after the vessel had parted her mooring at the wharf and her line to the buoy, and dragged with two anchors down.

Because of the failure of these salvors to carry out the bower anchor and sufficient chain to reach the ship in the proper direction to bring her back in the direction in which she went on, and especially because they failed to do so in spite of the protests of the master and mates, and the fact that they took up an anchor which the vessel already had down, and which prevented the vessel's drifting broadside against the reef, and especially because they parted a twelve-inch hawser they made fast, and attempted to float the vessel with a six-inch hawser, the Court held the salvors guilty of such gross negligence as forfeited their salvage, and in this connection said:

> "I do not intend to say or imply that I consider that any of the libelants acted with intentional bad faith, or dishonest purposes so as to taint any valuable service subsequently rendered, but that the services rendered the ship were grossly inefficient, and not deserving reward." (p. 925.)

The Court then considers the claims of other salvors with the elements of misconduct alleged against them, upon which subject the remarks of the Court are inter-

esting upon the general subject of forfeiture, and the grounds thereof.

The Diadem, Fed. Cas. No. 3874 (syl.):

> "Twelve Thousand Dollars held to be a reasonable award for getting a ship and cargo worth $125,000 off a reef at Key West; but this amount reduced by half because of 24 hours delay resulting from carelessness, negligence and gross errors of judgment on the part of the salvors."

We consider the foregoing cases sufficient to indicate our view of the law and its application to the facts of the case at bar.

II.

We come now to the second proposition, namely:

IF THE "NIIHAU" BE ENTITLED TO SALVAGE, THE AWARD OF ONE-HALF OF THE VALUE OF THE VESSEL, AND ONE-THIRD THE VALUE OF THE CARGO, IS, UNDER THE CIRCUMSTANCES, GROSSLY EXORBITANT.

Deductions From Reasonable Award.—If the Court does not consider the foregoing facts relating to the negligence or misconduct of the "Niihau" sufficient to warrant the denial of all salvage, it still is an important element to be considered in fixing the amount of the award, since the exhibition of skill and promptness in the service are determining factors in such a case.

The following cases suggest the mode in which the result is arrived at where such circumstances exist.

In *The John G. Paint,* Fed. Cas. No. 7,346, a salving vessel anchored the salved vessel near the port of New

York, intending to take her in in the morning, which the Court held was a mistake which caused some additional peril to the bark during the night, which better seamanship on the part of the brig would have avoided.

> "No harm resulted from the mistake beyond the delay, and yet it detracts from the merit of the salvors." * * *
>
> "The same law which gives to the salvors a reward exceeding any value of the labor bestowed, exacts of them all diligence, and is careful to mark any relaxation of that anxious solicitude for the safety of a vessel in distress, the encouragement of which is the object of all salvage rewards."

The Court deducted $3500 from the award on this account.

In *The Arburton,* Fed. Cas. No. 575, salvors, though acting in good faith, neglected to inform themselves of the soundings around the ship, by reason of which the ship after being heaved off one reef, was heaved onto another, of which the salvors were ignorant, and of which it was their duty to be informed. A reasonable award of 15% was reduced to 11% because of this error of omission.

Reasonable Award Without Deduction.—In considering the question of what would have been a reasonable award had no misconduct intervened, it is well to have in mind what elements of salvage exist. They are few, and none of them in their nature extreme.

As already suggested, the original danger to the "Halcyon" and cargo was practically none. The danger

from which she was rescued in her second tow was no doubt serious, but it was not, as contended by the libelants, one of total loss. As some of the witnesses testified, she might have lain there over a week, under the conditions prevailing, before breaking up, and as the principal value saved was that of the cargo, it is morally certain that under any conditions, if the vessel did not go to pieces within that time, the cargo could have been saved at comparatively small expense, either by taking it ashore at the point of beaching after the storm had subsided, or by discharging it into lighters and taking it to the wharf. Neither does the evidence warrant the conclusion that both ship and cargo might not at some subsequent time have been floated with comparative ease. Certain it is, that in neither position was either vessel or cargo derelict.

There appears to have been little or no danger to the salving vessel. In both instances she was securely anchored at a safe distance, and while there is always a possibility of her chains parting, or (if the libelants insist upon it in this case), of her propeller fouling the hawser, still, neither of these dangers seem to have been apparent in the present case. Indeed the fouling of the hawser would in any case be of little consequence so long as the anchors held, and there is no suggestion that either the anchors or chains were insufficient for the purpose. We may fairly assume that the danger to the tug did not in any case exceed the dangers to which she daily subjected herself in the course of her employment. The master testified that in his regular employment there are many landings that he is compelled to make where

the boat's crew is sent ashore by the means of surf-lines:

> "Yes, sir, very often; very common around a number of the landings. If you want me to name the landings I'll name some very bad landings. Kilauea is one. That's very treacherous. Hanalei has a very nice landing, but in winter time it is treacherous. There is another one I use surf-lines. There is another one in Kauai, Waimea; a very treacherous landing; we use the surf-line very often. Formerly when we had little boats and no wharf we used to handle the freight off the beach." (Rec. p. 369.)

It is fair to assume that at the points above named and when the crew were sent ashore by means of a surf-line, the steamer lay off such shore by means of her anchors.

We think therefore we are justified in insisting that on the present occasion there was no danger either to the salving vessel or to the salvors greater than such as is commonly undertaken by them in the ordinary course of their employment.

There was no danger, to speak of, to those on board the "Halcyon", certainly not in the first position, and almost as certainly not in the second position. The boat that brought the pilot aboard the "Halcyon" was astern of her at anchor in the breakers (her engine being temporarily disabled) before the pilot was put on board. While it does not appear that there would have been any necessity of taking the crew of the "Halcyon" off said vessel until after the storm had subsided, it seems

equally certain that at no time during that storm would there have been any difficulty in safely transferring such crew. The small boats—row boats—were about her all the time, and, under the very worst circumstances, if the "Niihau" could send a line aboard by means of a small boat and surf-line, there could have been no difficulty in taking the crew off by the same means.

So we think it is a fair deduction from the testimony that the only real element of salvage existing in this case was the danger to the vessel and cargo in her second position.

The time occupied, allowing for all delays, was from 4 o'clock in the morning to 10:05 the same morning—about 6 hours.

So far as the values saved are concerned—they are small,—$1500 for the vessel, and $6,381.85 for the cargo.

And yet, under these circumstances, the Court has given an award that would only be justified by the salvage of a derelict, and that, too, under circumstances involving great labor, and perhaps great danger, to the salvors.

While we do not find in the record anything to support the Twelfth Assignment of Error (p. 514), that the decision was rendered without the opportunity upon the part of the respondent to file its briefs and argument, we do know that the term of the Judge was about to expire, rendering it necessary for him to dispose of all matters submitted to him, and we feel justified in con-

cluding that this pressure upon the Court prevented a sufficiently careful consideration of the case.

In asking a review of this case we appeal to the principle recognized by this Court in the cases of *The Flottbeck,* 118 Fed. 965, and *The Celtic Chief,* 230 Fed. 763, that while an appellate Court will be reluctant to disturb the decision of the trial Court in salvage cases, nevertheless it is recognized that the appellate Courts are the final arbiters, and it is their duty to decide the question fearlessly and impartially, with a single eye to reach the ends of justice.

As said by the appellate Court of the second circuit in the case of *The Bay of Naples,* 48 Fed. 737:

> "Appellate courts will look to see if that discretion has been exercised by the court of first instance in the spirit of those decisions which higher tribunals have recognized and enforced, and will readjust the amount if the decree below does not follow in the path of authority, even *though no principle has been violated or mistake made.*"

In view of these principles, we are taking the liberty of citing a few cases with a resumé of the facts, which, though perhaps not exactly like the case at bar, have sufficient similarity to suggest the trend of opinion regarding the value of such services.

Cases Indicating Value of Services.

The Penobscott, 106 Fed. 419; C. C. A. 4th Cir.:

A schooner laden with lumber ran aground on the shoals at the mouth of Cape Fear River.

She was pounding heavily, leaking some, and was among the breakers; tide rising; moderate breeze blowing; current drifting her further on the shoals. Distress signal flying, life boat lowered; baggage of crew partly on deck and partly in small boat.

Steamer Wilmington went to her assistance, and in going in to, and returning with the schooner she passed through the breakers, waves going over her sides and into the engine room. A portion of the life-saving crew stationed nearby boarded the schooner and rendered such assistance as they could; no other vessel in sight except a sand sucker working on the bar, but not within speaking distance of the schooner; steamer drew 14 feet; could not reach the schooner, whose bow was in nine feet of water.

Time occupied, about an hour.

Value saved $8,000.00
Original award $2,000.00
Reduced by appellate Court to.... 1,000.00

The Nellie Floyd, 39 Fed. 221:

Three-masted schooner aground on the shore of Georgetown bar. Not under tow. Tug tried to get off, and failed, applied to the steamer P., which was going to Georgetown with a large and valuable cargo. Their efforts failed to move the schooner. The P. took on board some of the cargo, proceeded to Georgetown, and secured an extra force, unloaded her cargo, and returned. Weather in the meantime becoming threatening. Being unsuccessful she left and returned the next morning.

Jettisoned ⅓ of the cargo.

Subsequently succeeded in dragging her across the shoal into deep water.

Wind was high, and once at least the P. touched bottom. Also lost her hawser.

Danger to the Floyd was not extreme, but the tug drew too much water to aid her, and there was no other steamer in the vicinity approaching the power of the P. The schooner could not have got off unaided without reducing her draft by two feet, and waiting until the next day's high tide.

The P. was a passenger and freight steamer, not engaged in towing, and worth...$25,000.00
Value saved about..... ..... 16,000.00
Award ..... 1,000.00 and price of hawser 135.00

The Ranger, 75 Fed. 688:

Ashore on "perhaps the most dangerous shoal on the Jersey coast. Her position was one of extreme peril. There is little reason to doubt that, if she had not received assistance, she would have been a total loss." Other fishing boats in the vicinity refused to go to her assistance on account of the risk. The Allan concluded to run the risk. Lay by her all night, and at dawn the next morning began to pull. With the aid of another boat, not included in this case, succeeded in getting her off. The service was rendered not without considerable

risk, and the peril to which the Rawson was exposed was extreme.

Value saved $9,000.00
Award $1,750.00

The Hyderabad, 11 Fed. R. 749-758:

This was a case of a vessel on the Great Lakes, damaged by collision. Her crew left her for fear of her sinking; she had been deserted for nearly 30 hours when the tug came upon her; she was not, however, derelict, though in great danger for some time after the collision. The wind and sea went down, and after the tug got well under way with her tow the weather settled and was fine, and so continued until their arrival in port.

Services were well timed, faithful, and highly meritorious, but there was nothing extraordinary in the service.

The value saved was.....$17,566.87
Award $1,750.00

The Thomas L. James, 115 Fed. 566:

Schooner loaded with lumber run ashore by the master "to save life," on the coast of North Carolina, and stranded between two bars, in a position of extreme peril. She was regarded by her master and mate as being in an almost hopeless condition.

Three feet of water in her hold.

Drew thirteen feet, and was stranded in 10½ feet at ordinary high water.

Libelants, 10 in number, went on board and remained 3 days in a position of great peril. Pumped out the vessel and threw overboard her deck-load of 122,000 feet.

With the assistance of others floated the schooner and brought her into port. Also rafted and saved 40,000 feet of the jettisoned lumber.

Value saved $14,000.00
(Others who assisted not before the court)
Libelants allowed.....$1,000 and 1/3 the reasonable value of the lumber rafted and saved by them subsequently.
Time occupied, 30 days.

The Thomas A. Garland, 83 Fed. 1018:

Schooner laden with ice, ashore.

Her position was a dangerous one—shoal water, with a bottom of shifting sand, exposed to any storm which might arise, and protected from the force of the open seas only by the bar, upon which at high tide there was about 8 feet of water.

The only available aid was that offered by the "Rawson", no nearer help was nigh. Channel narrow and dangerous, surrounded by treacherous shoals of shifting or quicksands.

The services rendered were of a dangerous nature.

Damage to the bitts of the steamer, $151.90.

The vessel drawn off by the aid of anchors and the tug's power, by surging, in loosening the schooner from the sand.

Value saved—$8,000.00.

Award—$500.00.

Respectfully submitted,

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